A **LINGGIU VALLEY ORANG ASLI (JAKUNS) TRUST**

v.

VIRGIN PROPERTIES SDN BHD & ORS

B HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[CIVIL SUIT NO: 23NCVC-106-07-2012]
22 APRIL 2013

C ***CIVIL PROCEDURE:*** *Contempt of court - Breach of court order - Whether defendants breached court order - Whether a trust could commence committal application - Whether court order ambiguous and certain - Whether plaintiff had locus standi to commence committal proceeding*

D This was an application pursuant to a leave granted under O. 52 r. 2 of the Rules of the High Court 1980 ('RHC'), to commit the third and fourth defendants (D3 and D4) who were advocates and solicitors for contempt of court for breach of an order which *inter alia*, restrained the defendants from having any kind of E dealings with 27 units of apartments. The trust ('plaintiff') was appointed under an order of court in Johor Bahru High Court ('JBHC'). The receiver and manager ('R & M') were appointed to manage the trust in a subsequent JBHC civil suit to receive and F manage the assets. The defendants were alleged to have encumbered 11 units of the apartments by renting out the units to the Ministry of Defence and had received rental proceeds of RM34,650. D3 and D4 were further ordered to deposit and place into a designated account of the plaintiff all rentals and proceeds G received from the 27 apartments. There was no record of the defendants having disclosed the earnings from the balance 16 units. As such, the defendants were required to file an affidavit with regard to their assets as specifically required under the said order. However, there was no evidence of D3 and D4 having H declared all their assets pursuant to the order. D3 and D4 contended that the terms of the said order were ambiguous and uncertain and alleged that the principal order was not served on them. Further, the defendants also raised the issue of jurisdictional objection to the commencement of this application in the name of I the trust. It was argued that the plaintiff as a trust was not an individual recognised under the law as having the legal standing to sue or be sued, with the result that the plaintiff did not have the *locus standi* to commence the present application.

Held (allowing application with costs):

(1) The present application was brought through the plaintiff who was empowered by the appointment order to institute any legal proceedings on behalf of the trust. As such, the question of *locus standi* of the plaintiff to commence the present application did not arise. The submission that the proper plaintiff should be the R & M and not the trustee had no merits in view of the explicit terms of the appointment order. The submission that the action should have been commenced in the name of the beneficiaries of the trust was also of no merit. Hence, the jurisdictional objection raised by the defendants had no basis and had to be rejected. (para 10)

(2) D3 and D4 were clearly in breach of the said orders and had violated the terms of the order knowingly and intentionally on a continued basis when they continued to manage and have physical possession of the 27 units of apartment. The defences raised by the defendants were bare denials of non-compliance with the order. On a close reading of the order, the terms and conditions were neither vague nor ambiguous. It had set out precisely and in detail what the defendants were directed to do. A valid order that was subsisting must be obeyed by the parties unless it was set aside. (paras 13 & 14)

(3) The act of the contemnors in disobeying the order of the court despite being members of the Bar ought to be viewed seriously. The subject matter of the committal application *ie*, the trust was also the subject matter in the main suit. Apart from the complexity and overlapping of both facts and issues, common matters in dispute were pending determination at trial. As such, a custodial sentence was not appropriate. Considering the differing roles played by the defendants, D3 is sentenced to a fine of RM50,000 in default five weeks imprisonment while D4 is sentenced to a fine of RM30,000 in default three weeks imprisonment. (para 18)

Case(s) referred to:

Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v. Md Jaafar Abdul Carrim & Anor [1998] 1 CLJ Supp 454 HC ***(refd)***

Lee Lim Huat v. Yusof Khan Ghows Khan & Anor [1997] 3 CLJ 197 CA ***(refd)***

Mariola & Others v. Kaye-Eddie No & Others [1995] (2) SA 728 ***(refd)***

A *Tan Sri Dato (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC* ***(refd)***
Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal [1993] 3 CLJ 210 SC ***(refd)***

Legislation referred to:
B Rules of the High Court 1980, O. 52 r. 2

For the plaintiff - Renu Zechariah; M/s Rosley Zechariah
For the plaintiff in consolidated suit - G Ragumaren; M/s Rosley Zechariah
For the 3rd & 4th defendants - Shopna Rani Malakar (G Ravi with her); M/s Shopna Rani Malakar & Co
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Reported by Sandra Gabriel

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JUDGMENT

Gunalan Muniandy JC:

[1] This is an application by the plaintiff/applicant ('P') to commit the third and fourth defendants ('D3 and D4') for
E contempt of court for breach of an order dated 14 December 2011 ('the said order') issued by the Kuala Lumpur High Court ('KLHC'). The order was issued against, *inter alia*, D3 and D4, compelling them to do certain acts. This application is pursuant to leave granted to commence committal proceedings against D3 and
F D4 under O. 52 r. 2, Rules of the High Court 1980 ('RHC').

Material Facts

[2] The action against D3 and D4 was for not complying with and being in breach of the terms of the said order since it was
G served on them on 16 February 2012. Among the essential terms of the said order was that the defendants were restrained from having any dealings with the 27 units of apartments named therein. It was alleged that D3 and D4 in breach of the order continued to have management and physical possession of the
H apartments which they failed to hand over to P. Instead, they were alleged to have encumbered 11 of the 27 units of apartment by renting out the units to the Ministry of Defence and had received rental proceeds amounting to RM34,650. The rental proceeds were allegedly assigned to Affin Bank Berhad as security
I for personal housing loans taken by D3 from the bank.

[3] Equally important is that D3 and D4 were ordered to, from the date of service of the order, deposit and place into a designated account opened and operated by P in a named branch of Public Bank Berhad in Kuala Lumpur all rentals and proceeds received or earned from the 27 units. By failing to do so, they were contended to have breached a clear and specific term of the said order. There was no record of D2 and D3 having disclosed the earnings from the balance 16 units apart from the units rented out to the Ministry of Defence.

[4] Reference was also made to the failure of both defendants to file any affidavit with regard to their assets as specifically required to under the said order. As at to date, there is no evidence of D3 and D4 having declared all their assets in accordance with the terms of the order.

Preliminary Issues Raised By The Defence And Findings

[5] One of the main issues raised by D3 and D4 to challenge the committal proceedings was that the principal order was not served on them. P stated that the order was duly served on them on 16 February 2012 and in any case, it was evident from their affidavit evidence, particularly their affidavits in reply/opposition that they were fully aware of the said order and its terms. There was personal service of the motion for committal with the affidavits that constituted evidence in support of it. D3 and D4 had filed affidavits in opposition to the motion. Hence, non-service of the said order was, under the circumstances, a non-issue that did not go into the merits of the application.

[6] The defendants also raised the issue of a stay order of all interlocutory proceedings purportedly issued by the High Court pending the disposal of the main suit. The defendants were unable to produce the order referred to. More importantly a perusal of the court records did not show the existence of any order for stay of proceedings. As such, the issue of stay of proceedings affecting the present motion did not arise at this juncture.

[7] Another important issue raised by the defendants is a jurisdictional objection to the commencement of this application in the name of the trust. It was contended that the P as a trust was not a body/individual recognised under the law as having the legal standing to sue or be sued. Further, that there was no natural person or legal entity by the name of P and that, whether a non-entity can institute a claim or action was not a technical issue

A that could be waived. Reference was made to the case of the *Mariola & Others v. Kaye-Eddie No & Others* [1995] (2) SA 728 where it was held:

> ... in our law a trust is not a legal persona but a legal institution, *sui generis*. The assets and liabilities of a trust vest in the trustee
B or trustees. The trustee is the owner of the trust property for the purpose of administration of the trust, but *qua trustee* has no beneficial interest therein ...
>
> Unless one of the trustees is authorised by the remaining trustee
C or trustees, all the trustees must be joined insuing and all must be joined when an action is instituted against the trust.

[8] The trust ('plaintiff') was appointed under an order of court in Johor Bahru High Court ('JBHC') Originating Summons No: 24-828-1994. The R & M was appointed to manage the trust
D in a subsequent JBHC civil suit, MT1-22-228-2009 "to receive and manage the assets, in whatever form they may be found, constituting the trust and the sum awarded in the Johor High Court Originating Summons Suit No: 224-828-1994.". ('the appointment order').
E

[9] The appointment order empowers the R & M to *inter alia* "institute ... any legal proceedings".

[10] Even though the present action/application is commenced in
F the name of the trust, it was brought through the R & M who was empowered by the appointment order to institute any legal proceedings on behalf of the trust. This was, in my view, in compliance the terms of the above orders read together. As such, the question of the *locus standi* of P to commence the present
G application does not arise. The submission that the proper plaintiff should be the R & M and not the trustee had no merits in view of the explicit terms of the appointment order. The same goes for the submission that the R & M should have obtained leave of the court before commencing this action and that it should have been
H commenced in the name of the beneficiaries of the trust. Hence, the jurisdictional objection raised by the defendants had no basis and had to be rejected. For the record, a previous application by the defendants to remove the same R & M as a plaintiff was dismissed by this court on the ground that the R & M was not a
I litigant in his own cause as he did not bring the action in his own capacity but as R & M on behalf of the trust.

Findings On The Substantive Issues

[11] The law on what constitutes contempt of court has been set out precisely by the Federal Court in *Tan Sri Dato (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849 (FC) where Ariffin Zakaria, CJ held:

> Contempt has been reclassified either as (1) a specific conduct of contempt for breach of a particular court order; or (2) a more general conduct for interfering with the due administration or the course of justice ...
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> ... the law of contempt is wide enough to cover not only those who are bound by the court order, but other parties who assist the disobedience to the court order ... a person, who knowingly impeded or interfered with the administration of justice in an action between two other parties, was guilty of contempt of court notwithstanding that he was neither named in any order of the court nor had assisted a person against whom an order was made.
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> It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards in committal proceeding which require strict compliance ...
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> ... there must be personal service of the motion on him even though he appears by solicitors ... he must be served as well as with the motion, with the affidavits which constitute the evidence in support of it.
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> The procedural law on committal in our law is laid down in O. 52 of the RHC ... It provides that no application for a committal order can be made without leave of the court. The application for such leave must be made in accordance with O. 52 r. 2 of the RHC ... supported by a statement ... supported by an affidavit verifying the facts relied on in the statement ... the alleged act of contempt must be adequately described and particularized in detail in the statement itself ... The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself ...

[12] The terms of the said order require each of the defendants, including D3 and D4, to comply with orders one to five as set out therein. Having perused the specific terms of the said order and considered the affidavit evidence of both P and the defendants, I found that D3 and D4 were clearly in breach of the said order in these respects:

(i) They continued to deal with the 27 units of apartment as they continued to have management and physical possession of the same and had failed to hand them back to P;

(ii) 11 out of the said 27 units had been encumbered by the defendants by renting these units to the Ministry of Defence under a fixed term contract dated 14 August 2008 and assigning the rental proceeds to Affin Bank Berhad. The assignment was as security for 12 personal housing loans that D3 had obtained from the bank. The said order, *inter alia*, restrained all the defendants from having any kind of dealings with the 27 units, including encumbering them through a charge or otherwise and interfering in the present rentals;

(iii) Upon service of the said order D2 and D3 had failed to deposit and place into a designated Public Bank Berhad account as named in the order all rental and other benefits that they had received or earned from the 27 units. Their explanation of not having been supplied the account number was, in my view, a lame excuse that should not be entertained;

(iv) D3 and D4 till to date have not even disclosed their earnings from the balance 16 units apart from the 11 units rented out to the Ministry of Defence; and

(v) D3 and D4 have failed to file any affidavit disclosing their assets as specifically directed by the said order.

[13] In their affidavits in reply, D3 and D4 raised defences that were no more than bare denials of the alleged acts of non-compliance with the said order. They had failed to satisfactorily answer explain or rebut the instances of clear non-compliance with the terms of the said order as outlined above. Among the contentions of the defendants was that the terms of the said order were ambiguous and uncertain and not precise. Reference was made to the case of *Kesatuan Pekerja-Pekerja Perusahaan Dunlop Malaysia v. Md Jaafar Abdul Carrim & Anor* [1998] 1 CLJ Supp 454; [1998] 2 MLJ 244 where it was held:

> ... the stay order was ambiguous and uncertain in its terms. It did direct what has to be done. Thus, there had been no breach of the stay order by the respondents which had been proved to

> have occurred in this case. The stay order give rise to more than one meaning. Hence it was doubtful. To be effective, the terms of the stay order must be precise and unambiguous.

[14] However, on a close reading of the order, it appears to be neither vague nor ambiguous. It sets out precisely and in detail what the defendants are directed to do and what they are restrained from doing. D3 and D4, on the other hand, had clearly violated the terms of the order knowingly and intentionally on a continuing basis. As advocates and solicitors, they could not assert that they did not know how to comply with an order that was subsisting and enforceable. A valid order that is subsisting must be obeyed by the parties concerned unless and until it is set aside. In *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210 (SC) Abdul Hamid Omar, LP speaking for the Supreme Court held:

> It is established law that a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience, his duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences ... Orders of Court must be treated with respect and require strict obedience.

[15] In the above circumstances, I held that there was sufficient evidence to prove beyond any reasonable doubt that D3 and D4 had intentionally acted and/or omitted to act in breach of the terms of the said order. I, therefore, found them guilty of contempt of court as charged in the committal application.

Sentence

[16] Having heard the pleas in mitigation by D3 and D4 and their request for time to comply with the said order, I gave them a two week grace period to do so. After the lapse of the two weeks, when the case was recalled, the court was informed that they had only partially complied with the order specifically by filing affidavits disclosing their assets. As there was, admittedly, no full compliance, I proceeded to pass sentence.

[17] P pressed for no less than a custodial sentence of three months as a fine would not serve as a sufficient deterrent. It was argued that the conduct of D3 and D4, as advocates and solicitors, who should have been fully aware of the implications of disobeying orders of court, should be adequately punished. Their conduct was described as a serious interference in and affront to the administration of justice. Several authorities were referred to where the higher courts have called for deterrent sentences to reflect the seriousness of blatant disregard for court orders. While the seriousness of the acts of contempt by D3 and D4 cannot be denied, due regard must be given to their pleas in mitigation, the explanation advanced for not having complied with some of the directions contained in the said order and especially the particularly facts and circumstances of this case. In *Lee Lim Huat v. Yusof Khan Ghows Khan & Anor* [1997] 3 CLJ 197 (CA) Gopal Sri Ram, JCA (as he then was) held, *inter alia*:

> ... it is axiomatic that when it comes to sentence, subject to questions of policy, each case must be dealt with according to its own facts. It is therefore quite idle to suggest that because a defendant in another case received a lighter punishment, the appellant before us should also receive a like sentence. The principle that one set of facts are not precedent for another applies with equal force in matters of punishment.
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> We are here not dealing with the case of a layman accused of breaching an injunction. The appellant is a member of the Bar.
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> As such he, more than anyone else, should respect and obey an injunction issued by the Court. The dignity of the judicial arm of the Government will surely be eroded if orders of a Court are honoured more in their breach than observance by members of the Bar. The sentence passed should, apart from reflecting the gravity of the particular offence, act as a deterrent to would be violators of injunctions.

[18] The acts of the contemnors in this case in disobeying the said order of court despite being members of the Bar have no doubt to be viewed seriously but the question was whether these acts were so grave and reflected a flagrant disregard for the authority of the court that they warranted a custodial sentence. It was not disputed that the defendants had partially complied with the said order, ie, by surrendering title deeds to the 27 condominium units. After the grace period given by the court

for compliance, they had filed affidavits to declare their assets even though the sufficiency of the declaration was challenged. More importantly, the subject-matter of this committal application, ie, the trust, is also the subject-matter of the main suit involving the applicant/plaintiff and the defendants in respect of which the trial has begun in consolidation with the first Johor Bahru suit. Both the suit and the application arise from the same factual background. Apart from the complexity and overlapping of both facts and issues, common matters in dispute are pending determination at the trial.

[19] Having considered all the relevant mitigating and aggravating together with the history of the case, I held that a custodial sentence would not be appropriate at this juncture. In view of the different roles played by D3 and D4 in the acts of contempt with D3 having played a major role. I sentenced them as follows:

(i) D3 sentenced to a fine of RM50,000 in default five weeks imprisonment.

(ii) D4 sentenced to a fine of RM30,000 in default three weeks imprisonment.

Each defendant was also ordered to pay costs of RM5,000 to the plaintiff forthwith.